44) Lord Pearce, in the Privy Council, said, at page 16, that it provides a sensible and intelligible scheme but observed that no general hardship is created by this scheme. He went on to say:—

"A particular hardship may arise in a case like the present where the holding company chose to pay out an increased dividend (with the consequent increased deduction of tax) in the same year as it received an increase from the B. company with the result that the tax deducted by the company from its shareholders has to be taken into account in 1956 whereas the tax which the company will have to pay in respect of the increased dividend so received from the B. company will not be payable or fall to be taken into account until the following year. And by that time the Government have already become entitled to any excess created by the increased deduction of tax in 1956. Such a situation would not arise in the case of an ordinary trading company which does not distribute its profits during the year in which they are earned but in the following year which is the year of assessment in respect of those profits".

But a hardship such as that referred to above was within the control of the parent company in the present case and could have been avoided by the simple expedient of waiting for a further 4½ months till the beginning of 1966 before it declared the dividend which it did on 17th August, 1965. It is unfortunate perhaps that the sum in question may be irretrievably lost to the defendants, according to the opinion of Mr. Franklin, who gave evidence as an independent accountant with regard to the accounting practice affecting group companies. I would also add that I was at one stage somewhat attracted by the able submissions made by Mr. Hill on behalf of the defendants with regard to the accounting practice in question and its judicial acceptance in England but the case really turns on whether our Ordinance has expressed its meaning in such sufficiently clear terms as to override accounting practice, which, I think, it has done.

Judgment will accordingly be entered for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors: *Rodyk & Davidson.*

STEPHEN KALONG NINGKAN v. GOVERNMENT OF MALAYSIA

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) December 1, 1967]

[K.L. — Federal Court Suit No. X. 1 of 1967]

Constitutional Law — Proclamation of emergency — Emergency as ground for amendment of Federal Constitution and Constitution of State of Sarawak — Emergency "whereby the security of the Federation or any part thereof is threatened" — Plea that proclamation was in fraudem legis — Validity of proclamation questioned as ultra vires Federal Parliament — Power of Federal Parliament to amend Constitution of State of Sarawak questioned — Defence of Crown privilege — Judicial review of executive action — Constitution of Malaysia, arts. 4, 40(1), 79, 150(1), (5) (6) & (6A) and 161E(2) — Constitution of State of Sarawak, art. 41 — Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, ss. 3, 4 and 5.

On July 22, 1963 the petitioner was appointed Chief Minister of Sarawak and so acted as leader of the majority party in the Council Negri. On June 16, 1966 the Governor, acting on representations said to have been made to him by the majority in the Council that they had lost confidence in their Chief Minister, requested the petitioner to resign. Upon his non-compliance the Governor, on June 17, 1966, purported to dismiss him together with other members of the Supreme Council and appointed Penghulu Tawi Sli as Chief Minister. Action being brought in the High Court at Kuching, Harley Ag.C.J., on September 7, 1966 declared the dismissal of the petitioner void ([1966] 2 M.L.J. 187). On September 14, 1966, His Majesty the Yang di-Pertuan Agong proclaimed a state of Emergency in Sarawak. On September 19, 1966 the Federal Parliament passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, amending clauses (5) and (6) in article 150 of the Federal Constitution by inserting after "this Constitution" the words "or in the Constitution of the State of Sarawak" and providing further that, notwithstanding anything in the State Constitution, the Governor may summon the Council Negri, suspend standing orders and issue directions binding on the Speaker. Pursuant thereto, the Governor, on September 23, 1966 summoned a meeting of the Council Negri, which passed a vote of no confidence in the petitioner; he was then dismissed the following day.

In his second action in the High Court at Kuching the petitioner claimed (a) that the proclamation of a State of Emergency, being made on the advice of the Federal Cabinet, was null and void in that it was not made *bona fide* but *in fraudem legis*, and (b) that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, was on that account null and void. On December 2, 1966 Pike C.J. (Borneo) holding *inter alia* that an action to declare a Federal law invalid required leave of a judge of the Federal Court before commencement of proceedings, by virtue of article 4 of the Federal Constitution, ordered certain paragraphs in the statement of claim struck out ([1967] 1 M.L.J. 46). On February 20, 1967 leave was given by the Lord President for institution of proceedings against the Government of the Federation of Malaysia for a declaration that the said Act was invalid and/or that sections 3, 4 and 5 thereof were invalid as being *ultra vires* the Federal Government. In his petition the petitioner alleged that no grave Emergency had arisen in the State of Sarawak which could not be effectively dealt with under the previous proclamation of emergency made on September 7, 1964, that the Federal Cabinet well knew that no such emergency existed "whereby the security or economic life of Sarawak was threatened"; that the proclamation was *in fraudem legis* in that it was made not to deal with grave emergency whereby the security or economic life of Sarawak was threatened but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak, and that the amendment of clauses (5) and (6) of article 150 of the Federal Constitution were null and void as *ultra vires* the Parliament and contrary, not only to article 150 and article 161E(2) of the Federal Constitution, but also the entrenched provisions in article 41 of the Sarawak Constitution and relevant provisions in the Malaysia Act, 1963.

Held (by Barakbah L.P. and Azmi C.J. (Malaya), Ong Hock Thye F.J. dissenting): (1) it is incumbent on the court to assume that the Government was acting in the best interests of the State and to permit no evidence to be adduced otherwise;

(2) the Yang di-Pertuan Agong alone could decide whether a state of emergency, whereby the security or economic life of the Federation was threatened, existed;

(3) the circumstances which bring about a state of emergency are non-justiciable.

Bhagat Singh v. *King-Emperor* (1) *King-Emperor* v. *Benoari Lal Sarma* (2) and *Liversidge* v. *Anderson* (3) applied.

Per Ong Hock Thye F.J.: (1) the plea *in fraudem legis* was made solely against the Cabinet, upon whose advice the Yang di-Pertuan Agong, as a constitutional ruler, was bound to act, by virtue of article 40(1) of the Federal Constitution, (2) Cabinet responsibility for advising a proclamation of emergency was publicly admitted and never disclaimed; (3) the constitutional position of the Governor-General of India under the Government of India Act, 1935, was neither comparable with nor similar to that of the Malaysian Cabinet; (4) article 150 of the Federal Constitution, by specifically providing that the emergency must be one "whereby the security or economic life of the Federation or of any part thereof is threatened" does not confer on the Cabinet an untrammelled discretion to cause an emergency to be declared at their mere whim and fancy; (5) the plea raising the question of *bona fides* involves a question of fact which must be faced; (6) the crucial question here is whether the proclamation was made (a) not to deal with a grave emergency threatening the security of Sarawak, but (b) for the purpose of removing the Chief Minister from office; (7) even if the finding of fact as to (b) is in the affirmative, such objective was not necessarily incompatible with a genuine concern felt by the Cabinet as regards the security situation in Sarawak; (8) political instability could possibly have serious repercussions on the security of the State; (9) on the evidence, which included statements by the Deputy Prime Minister and the Minister for Home Affairs, on Communist activities in Sarawak, it was impossible to say that the Cabinet advice to His Majesty was not prompted by *bona fide* considerations of security; (10) for this reason the petitioner had failed to make out a case for holding that the proclamation of emergency was made *in fraudem legis;* (11) as to the invalidity of sections 3, 4 and 5 of the amending Act of 1966, it may be stated, briefly, that the overriding consideration of an emergency which justifies an amendment of the Federal Constitution must no less justify an amendment of the State Constitution, so far as may be strictly necessary.

Robinson v. *State of South Australia (No. 2)* (6) applied.

The petition was accordingly dismissed: no order being made as to costs: see rule 52 of the Federal Court (Original and Consultative Jurisdiction) (Transitional) Rules, 1963.

Cases referred to:—

(1) *Bhagat Singh* v. *The King-Emperor* L.R. 58 I.A. 169.

(2) *King-Emperor* v. *Benoari Lal Sarma & Ors.* [1945] A.C. 14.

(3) *Liversidge* v. *Sir John Anderson & Anor.* [1942] A.C. 206.

(4) *Lawrence* v. *Lord Norreys* 15 App. Cas. 210.

(5) *Conway* v. *Rimmer* [1967] 1 W.L.R. 1031.

(6) *Robinson* v. *State of South Australia (No. 2)* [1931] A.C. 704.

FEDERAL COURT.

Sir Dingle Foot, Q.C. *Thomas O. Kellock,* Q.C. & *T. O. Thomas* for the petitioner.

Syed Othman bin Ali and *Au Ah Wah* for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: This is a petition praying for:—

(a) an order declaring that the measure known as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is *ultra vires* the Federal Parliament, invalid, null and void and of no legal force and effect; alternatively,

(b) an order declaring that clauses 4 and 5 of the measure known as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, are *ultra vires* the Federal Parliament, invalid, null and void and of no legal force and effect.

The events which led up to this case may be summarised as follows.

On 22nd July, 1963, the petitioner was appointed Chief Minister of Sarawak. On 17th June, 1966, His Excellency the Governor of Sarawak issued a declaration that the petitioner had ceased to be the Chief Minister of Sarawak and purported to appoint another Chief Minister, Penghulu Tawi Sli, in his place. The petitioner instituted proceedings in the High Court in Borneo in order to challenge the validity of that declaration by His Excellency the Governor. On 7th September, 1966, the Acting Chief Justice of Borneo, Mr. Justice Harley, gave judgment for the petitioner in these proceedings.* He held, and I quote his words, that: "The plaintiff (that is the petitioner) is and has been at all material times Chief Minister of Sarawak", and he granted an injunction restraining Penghulu Tawi Sli from acting as Chief Minister. On 14th September, 1966, His Majesty the Yang di-Pertuan Agong proclaimed a state of emergency under article 150 of the Constitution of Malaysia. That Proclamation of Emergency reads:—

"WHEREAS WE are satisfied that a grave Emergency exists whereby the security of a part of the Federation, to wit the State of Sarawak, is threatened:

AND WHEREAS article 150 of the Constitution provides that in the said circumstances WE may issue a Proclamation of Emergency:

NOW, THEREFORE, WE, Tuanku Ismail Nasiruddin Shah ibni Al-Marhum Al-Sultan Zainal Abidin, by the Grace of God of the States and territories of Malaysia Yang di-Pertuan Agong in exercise of the powers aforesaid do hereby proclaim that a State of Emergency exists, and that this Proclamation shall extend throughout the territories of the State of Sarawak."

As this case mainly depends on the true construction of article 150 of the Constitution it will be necessary to quote the whole of the article. It is as follows:—

"(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong

* [1966] 2 M.L.J. 187.

shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

(3) A Proclamation of Emergency and any ordinance promulgated under clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under clause (1) or promulgate any ordinance under clause (2).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) Subject to clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution or in the Constitution of the State of Sarawak, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

(6) Subject to clause (6A), no provision of any ordinance promulgated under this article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of the State of Sarawak.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays or with respect to any matter of native law or custom in a Borneo State; nor shall clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period."

On 20th September, 1966, the Federal Parliament of Malaysia met in a special session and passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, (hereinafter called the "Emergency Act"). It is "an Act to amend the Federal Constitution and to make provision with respect to certain constitutional matters in the State of Sarawak, consequent upon a Proclamation of Emergency having been issued and being in force in that State." The relevant sections of the Emergency Act are sections 3, 4 and 5. Section 3 reads as follows:—

"(1) In article 150 of the Constitution —

(a) in clause (5), after the word 'Constitution' where it first occurs, there shall be inserted the words 'or in the Constitution of the State of Sarawak'; and

(b) in clause (6), after the word 'Constitution' at the end thereof, there shall be added the words 'or of the Constitution of the State of Sarawak'.

(2) The amendments made by subsection (1) of this section shall cease to have effect six months after the date on which the Proclamation of Emergency issued by the Yang di-Pertuan Agong on the fourteenth day of September, 1966 ceases to be in force."

Section 4 states:—

"(1) Notwithstanding anything in the State Constitution the Governor may, in his absolute discretion, summon the Council Negri to meet at such place and on such day or dates and after such period of notice as he shall think fit, and the provisions of the Standing Orders of the Council Negri shall, to the extent that they are inconsistent with the directions of the Governor contained in the Summons, be deemed to be suspended.

(2) In order to ensure that any meeting of the Council Negri summoned as aforesaid is duly held and that any business which it is expedient, in the opinion of the Governor, should be transacted thereat is duly transacted and concluded, the Governor may, in his absolute discretion, direct that any of the Standing Orders of the Council Negri be suspended and give any special directions which he may consider necessary.

(3) Any such directions as aforesaid shall be in the form of a message to the Council Negri addressed to the Speaker, and the Speaker shall comply therewith.

(4) If the Speaker fails to comply with any direction given by the Governor as aforesaid, the Governor may, in his absolute discretion, nominate any member of the Council Negri to act as Speaker, and the member so appointed shall have all the powers of the Speaker, for the purposes of that meeting."

Section 5 is as follows:—

"(1) If at any meeting of the Council Negri, whether held in pursuance of the provisions of section 4 of this Act or otherwise, a resolution of no confidence in the Government is passed by the votes of a majority of those members present and voting, and if after such a resolution is passed the Chief Minister fails forthwith to resign his office and to tender the resignation of the members of the Supreme Council, the Governor may, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council.

(2) Where the Chief Minister and members of the Supreme Council have been dismissed as aforesaid they shall forthwith cease to exercise the functions of their respective offices and the provisions of the State Constitution shall thereupon have effect for the purpose of appointing a new Chief Minister and members of the Supreme Council and for all other purposes pursuant thereto."

On 20th February, 1967, the Lord President of this court passed an order under article 4 of the Federal Constitution granting leave to the petitioner to commence proceedings against the respondent Government. Hence this petition.

The petitioner's allegations can be listed roughly as follows:

(1) The Proclamation of Emergency made by His Majesty the Yang di-Pertuan Agong was not a valid proclamation and therefore the Emer-

gency Act was bad because it was made on a Proclamation of Emergency which was null and void.

(2) It is not within the powers of the Federal Parliament to amend the Constitution of Sarawak and, therefore the provisions of the said Act as contained in sections 3, 4 and 5 were *ultra vires* the Federal Parliament; in the alternative the Federal Parliament can only amend either the Federal Constitution or the Constitution of Sarawak in the manner provided by articles 159(3) and 161E of the Federal Constitution.

With regard to the first issue, the Proclamation of Emergency was made under clause (1) of article 150 of the Constitution which states:—

"If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency."

In my view the question is whether a court of law could make it an issue for the purpose of a trial by calling in evidence to show whether or not His Majesty the Yang di-Pertuan Agong was acting in bad faith in having proclaimed the emergency. In an act of the nature of a Proclamation of Emergency, issued in accordance with the Constitution, in my opinion, it is incumbent on the court to assume that the Government is acting in the best interest of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non justiciable.

Sir Dingle Foot, counsel for the petitioner, quoted a number of authorities in which the courts had observed that where a discretionary power was given to any person or authority the courts would have some sort of control to see to it that the power was properly exercised and that there was no excess or abuse of power. In my view those authorities relate only to delegated legislation and a Proclamation of Emergency by the Yang di-Pertuan Agong, who is the Head of State, does not fall under any of these categories. I am fortified in my view by the case of *Bhagat Singh* v. *The King-Emperor* [1] in which Viscount Dunedin stated (at p. 171):—

"Now the only case that is made here is that section 72 of the Government of India Act did not authorize the Governor-General to make the order he did constituting a special tribunal for the trial of the offenders who, having been convicted, are now petitioners here. Section 72, as amended in 1919, is as follows: 'The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making Ordinances under this section is subject to the like restrictions, as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act.'

The petitioners ask this board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action, which is to be judged as such by some one. It is more than obvious that that some one must be the Governor-General, and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance."

His Lordship went on to say (at p. 173):—

"Their Lordships must add that, although the Governor-General thought fit to expound the reasons which induced him to promulgate this Ordinance, this was not in their Lordships' opinion in any way incumbent on him as a matter of law."

This was followed by the case of *King-Emperor* v. *Benoari Lal Sarma & Ors.* [2] See also the case of *Liversidge* v. *Sir John Anderson & Anor.* [3]

In my opinion the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists it is not for the court to inquire as to whether or not he should have been satisfied.

With regard to the second and the alternative allegations of the petitioner, in my view the important words in article 150(5) of the Constitution are:— "Subject to clause (6A)", "while a Proclamation of Emergency is in force", "notwithstanding anything in this Constitution" and "make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency". It is my view that because of these words Parliament is not fettered by articles 159(3), 161A, 161C and 161E. The expression "notwithstanding anything in this Constitution" overrides the provisions relating to "concurrence" and "consent". During an Emergency the powers of Parliament are not extended only to matters respecting Muslim law, native customs, etc. [article 150(6A)]. I therefore hold the view that under article 150 of the Constitution the Federal Parliament has power to amend the Federal Constitution and the Constitution of Sarawak and sections 3, 4 and 5 of the Emergency Act are *intra vires* and have been validly enacted.

In the circumstances I would dismiss this petition.

Azmi C.J. (Malaya): This is a motion for a declaration of this court that the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, hereinafter referred to as the Emergency Act 1966, is invalid and/or that clauses 3, 4 and 5 of the said Act were invalid on the ground that they were *ultra vires* the Federal Parliament.

It is necessary to refer to some facts of this case.

In his affidavit sworn on the 13th December 1966, the applicant affirmed to the effect that he

was appointed Chief Minister of Sarawak by an instrument under the public seal dated 22nd July 1963 and on the 17th June 1966 the Governor of Sarawak declared to the effect that he the applicant, had ceased to hold office as Chief Minister of Sarawak and on the 24th December 1966 dismissed him from his position as Chief Minister.

The applicant subsequently filed a suit — (Civil Suit No. K. 45 of 1966)* at the High Court at Kuching and on the 7th September 1966, the High Court declared that the applicant notwithstanding the declaration of the Governor was and is still the Chief Minister of Sarawak, and at the same time granted him an injunction restraining the person appointed by the Governor from acting as Chief Minister.

On the 14th September 1966, the Yang di-Pertuan Agong proclaimed a state of emergency in Sarawak (see *Gazette* Notification P.U. 339A).

On 20th September 1966, the Federal Parliament passed the Emergency Act 1966. This act amended both the Sarawak Constitution and the Federal Constitution, and in February 1967, the applicant filed this motion, after having previously obtained the leave of the Lord President.

The applicant urged before us the following reasons in support of this application:—

(1) that the proclamation of emergency made by the Yang di-Pertuan Agong (P.U. 339A) was an invalid proclamation, in the alternative

(2) that it is not within the power of Federal Parliament to amend the Constitution of Sarawak and in the alternative

(3) that the Federal Parliament can only amend the Federal Constitution or the Constitution of Sarawak in a manner provided by article 159 clause (3) and article 161(E) of the Federal Constitution.

In reference to the first submission it is necessary to refer to article 150 of the Federal Constitution. Clause (1) of that article reads as follows:—

"(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part thereof is threatened he may issue a proclamation of emergency."

In reference to this point it is necessary to refer to two Privy Council cases namely: (1) *Bhagat Singh* v. *King-Emperor* [1] and (2) *King-Emperor* v. *Benoari Lal Sarma & Ors.* [2]

In the *Bhagat Singh's* case, the facts would appear to show that in May 1930, the Governor-General of India in exercise of the powers given him by section 72 of the Government of India Act made and promulgated the Lahore Conspiracy Case Ordinance 1930 which transferred trial of a case to a special tribunal. The promulgation of the Ordinance was accompanied by a statement of the reasons moving the Governor-General to exercise his powers. The petitioners were tried and convicted by a tribunal constituted under the ordinance.

It was submitted before the Privy Council that the power under section 72 was subject to three conditions.

(1) There must be an emergency.

(2) The ordinance must be for peace and good government.

(3) It must be one within the legislative powers of the Indian Legislature.

It was urged that the prosecution did not show that any emergency existed and in fact there was none. It was also urged that the ordinance was not one for peace and good government and that it exceeded the powers of the Indian Legislature.

Section 72 of the Government of India Act reads as follows:—

"The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making Ordinances under this section is subject to the like restrictions, as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act."

I will now quote a relevant passage in the judgment of the Privy Council:—

"The petitioners ask this board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action, which is to be judged as such by some one.

It is more than obvious that that someone must be the Governor-General, and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.

Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this board declaring that once the Ordinance was challenged in proceedings by way of *habeas corpus* the Crown ought to prove affirmatively before a court that a state of emergency existed, or (b) by a finding of this board — after a contentious and protracted inquiry — that no state of emergency existed, and that the Ordinance with all that followed on it was illegal.

In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it."

In reference to the second point this is what the judgment said:—

"It was next said that the Ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also

* [1966] 2 M.L.J. 187.

the judge of that. The power given by section 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it."

It was urged before us that the Indian section 72 may be distinguished from our article 150(1) in that in our article there were qualifying words to the word "emergency" namely "whereby the security or economic life of the Federation or of any part thereof is threatened." And by reason of the existence of these words in the clause it becomes open to this court to enquire whether the security or economic life of the Federation was indeed threatened at that time. With respect, in the *Bhagat Singh* case it was not open to the courts to enquire whether the ordinance made in pursuance of the proclamation did or did not induce to peace and good government of British India because the Governor-General was held to be the sole judge of that, notwithstanding the words "for the peace and good government of British India."

In my view therefore notwithstanding the qualifying words the Yang di-Pertuan Agong in exercise of his power under clause (1) of article 150 must be regarded as the sole judge of that. He alone could decide whether a state emergency whereby the security or economic life of the Federation was threatened, did exist.

There is something in the passage in the judgment of the other case *King-Emperor* v. *Benoari Lal Sarma & Ors.* that might suggest that it could still be open to the court to question the *bona fide* of the Yang di-Pertuan Agong. The passage is at page 21 of the report and reads as follows:—

"It is to be observed that the section does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the ordinance or at all, assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that the emergency exists. In the present instance such questions are immaterial, for at the date of the ordinance (January 2, 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared war on the previous December 7: Rangoon had been bombed by the enemy on December 23, and again on December 25: earlier ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises, and so forth. Their Lordships entirely agree with Rowland J.'s view that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen; but, as that learned judge goes on to point out, and, as had already been emphasized in the High Court, the question whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the board in *Bhagat Singh* v. *The King-Emperor* and is plainly right."

At first sight it could be suggested particularly from the first part of the above passage that the court could still go into the question of the *bona fide* of the Governor-General, but in my view it is clear that the question whether an emergency existed at the time when an ordinance was made and promulgated was still a matter on which the Governor-General was the sole judge and that, therefore, no court may inquire into it. In the circumstances it is no longer desirable that I should deal with all the cases cited to us dealing with the exercise of discretion of a statutory body. I would therefore say that the applicant's submission must fail.

In reference to the second submission, namely, that it is not within the power of Federal Parliament to amend the Constitution of Sarawak, it is necessary in my view to consider clause (5) of article 150 of our Constitution. Clause (5) reads as follows:—

"(5) Subject to clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, or in the Constitution of Sarawak, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Aging for his assent."

Clause (6A) reads as follows:—

"(6A). Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter or native law or customs in a Borneo State; nor shall clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language."

In my view, clause (5) is very clear, that whilst a proclamation of emergency is in force, Parliament may make any law on any matter whether such matter is a matter in the Federal List, State List or Concurrent List or any other matter that may come under article 77. Article 77 deals with the residual power of legislation by the Legislature of a State.

It was urged as I understood it that the the words "any matter" in line 4 of clause (5) above could only mean a matter within the Federal List. In my view that cannot be so because it is provided in clause (5) itself that it is to be subject to clause (6A) and clause (6A) specially exempts certain matters such as Muslim law or the customs of the Malays or the native law and customs in the Borneo States, which as can be seen from the 9th Schedule are matters in the State List.

It is obvious in my view, that if the words "any matter" were intended to be confined to a matter in the Federal List, clause (6A) would appear unnecessary.

It was also urged before us that any attempt to amend the Constitution of Sarawak would be

contrary to article 41 of the Sarawak Constitution.

Article 41 reads as follows:—

"(1) Subject to the following provisions of this article the provisions of this Constitution may be amended by an Ordinance enacted by the Legislature but may not be amended by any other means."

We were asked to note the clear words "but may not be amended by any other means." It was also pointed out to us that these words did not appear in any other State Constitution of the Federation. But I think Sir Dingle Foot admitted later that this was not quite right because similar words or words to that effect also appear in the Constitutions of Johore and Kedah among others. In my view, however, notwithstanding the existence of these words in the Sarawak Constitution, the Yang di-Pertuan Agong may in exercise of his authority under article 150 of the Federal Constitution amend the Constitution of Sarawak under article 150 clause (5) for reasons I have stated.

It was also pointed out to us that under article 161E clause (2) no amendment to the Constitution of Sarawak may be made without the concurrence of the Governor of that State.

The said clause (2) reads as follows:—

"(2) No amendment shall be made to the Constitution without the concurrence of the Governor of the Borneo States or each of the Borneo States concerned, if the amendment is such as to affect the operation of of the Constitution as regards, *inter alia*.

(c) matters with respect to which the Legislature of the State may (or Parliament may not) make laws and the executive authority of the State in those matters."

In my view, however, by reason of the words in clause (5) of article 150, namely "and article 79 shall not apply to a bill for such a law or an amendment to such a bill, nor shall any provision of this Constitution or any written law which requires any consent or concurrence to the passing of a law or in consultation with respect thereto," no concurrence of the Governor of Sarawak would appear to be necessary. For this reason this submission must also fail.

I do not think I need say anything in reference to the third submission, because in my view this judgment in reference to the first two submissions have sufficiently covered that point.

I would therefore say that this application should be dismissed.

Ong Hock Thye F.J.: I have had the advantage of reading the judgments of the learned Lord President and the learned Chief Justice of Malaya. With all respect I am unable to share their view that, under article 150 of the Federal Constitution, His Majesty the Yang di-Pertuan Agong is "the sole judge" whether or not a situation calls for a Proclamation of Emergency, in other words, that "the circumstances which bring about a Proclamation of Emergency are non-justiciable."

His Majesty is not an autocratic ruler since article 40(1) of the Federal Constitution provides that "In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong *shall act in accordance with the advice of the Cabinet* . . . ." In this petition, therefore, when it was alleged by the petitioner "that the said proclamation was *in fraudem legis* in that it was made, not to deal with a grave emergency whereby the security or economic life of Sarawak was threatened, but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak," there never was even the ghost of a suggestion that His Majesty had descended into the arena of Malaysian politics by taking sides against Sarawak's legitimate Chief Minister. With the greatest respect, it is unthinkable that His Majesty, as a constitutional ruler, would take on a role in politics different from that of the Queen of England.

The allegation of fraud was unmistakably made against the Cabinet as it was supported by particulars set out at length in the seven pages of paragraph 6 of the petition. If justice is not only to be done but be seen to be done, I do not believe that I can shirk my plain duty by turning a blind eye to the facts. It was repeatedly and publicly stated, in the plainest of terms, that it was on Cabinet advice that the Yang di-Pertuan Agong proclaimed the Emergency. This fact was never denied and no attempt was ever made by the Cabinet to disclaim responsibility. Neither of my learned brethren, however, considered this fact in the least bit relevant, since they said nothing about it. With all respect, therefore, I will not join in what I consider a repudiation of the Rule of Law, for I do not imagine, for a moment, that the Cabinet has ever claimed to be above the Law and the Constitution.

My learned brethren in their judgments never condescended to the material facts. With respect, I do not feel at liberty to wield the editorial blue pencil as they have done, when stating the facts of this, or indeed any other, case when the issue is a question of fact. It seems to me that the omission of material facts from consideration must lay the Judiciary exposed to reflections which I need not particularise. It has also been said that when a case is weak on the facts reliance must be placed most strongly on questions of law. Counsel for the Federation Government has plainly concentrated on the legal quibble that the ostensible decision to proclaim an Emergency being that of His Majesty himself, the question raised by the petitioner was on that account not justiciable. Disregarding the clear provisions of article 40(1), he has relied on two Indian cases, decisions of the Privy Coun-

cil in 1931 and 1944, which have found favour with my learned brethren. Again with respect, I do not consider the *ratio decidendi* in those cases applicable herein because section 72 of Schedule IX of the Government of India Act, 1935, is manifestly not *in pari materia* with article 150 of the Federal Constitution, nor is the constitutional position of the Malaysian Cabinet comparable or similar to that of the Governor-General of India. Hence it is quite erroneous to argue by analogy from the Government of India Act to our Constitution as if those authorities were unquestionably conclusive. The plain fact is that the Governor-General of India, in the words of Viscount Simon L.C. in *King-Emperor* v. *Benoari Lal Sarma & Ors.*[2] (at p. 21) was not required by section 72 "to state that there is an emergency, or what the emergency is, either in the text of the ordinance or at all, and assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that an emergency exists." On the other hand, the inbuilt safeguards against indiscriminate or frivolous recourse to emergency legislation contained in article 150 specifically provide that the emergency must be one "whereby the security or economic life of the Federation or of any part thereof is threatened." If those words of limitation are not meaningless verbiage, they must be taken to mean exactly what they say, no more and no less, for article 150 does not confer on the Cabinet an untrammelled discretion to cause an emergency to be declared at their mere whim and fancy. According to the view of my learned brethren, however, it would seem that the Cabinet have *carte blanche* to do as they please — a strange role for the judiciary who are commonly supposed to be bulwarks of individual liberty and the Rule of Law and guardians of the Constitution.

Since the principal issue in this case turns on an allegation of fraud, supported by precise and full allegations of fact, as required by established rules of pleading (see *Lawrance* v. *Lord Norreys* [4]), it is incumbent on me, irrespective of the views of my learned brethren, to apply my mind to the facts of this case. I shall, therefore, set out all the undisputed facts herein which are relevant and material as affecting the determination of the question in issue. They are gathered from the petitioner's petition dated February 23, 1967, his affidavit of May 9, 1967 verifying the contents of such petition, the defence dated April 28, 1967 filed on behalf of the respondent and the recital of relevant facts found by Harley Ag. C.J. (Borneo) as set out in his judgment in Kuching Civil Suit No. K. 45 of 1966.* There being no appeal against such judgment, the findings of fact of course are *res judicata* and conclusive. In that case the present petitioner was the plaintiff.

On July 22, 1963 the petitioner was appointed Chief Minister of Sarawak. On June 14, 1966 there was a meeting of the Council Negri attended by the Speaker, the petitioner and 20 other members. Five members of the opposition were among the 21 members present, of whom 3 were *ex officio*. Bills were passed without opposition on that day: as the learned Acting Chief Justice found, "the fact remains that there has never been a motion of no confidence put in Council Negri, nor has there been any defeat of a Government bill."

On June 14, 1966 a letter addressed from Kuala Lumpur to the Governor of Sarawak by the Federal Minister for Sarawak Affairs (who was *not* a member of Council Negri himself) stated that "we the undersigned members of Council Negri . . . no longer have any confidence in the Hon. Dato' Stephen Kalong Ningkan to be our leader in the Council Negri and to continue as Chief Minister," that the latter was bound by article 7(1) of the Sarawak State Constitution to tender the resignation of members of the Supreme Council and concluding with a request that the Governor take appropriate action under that article as well as by appointing a new Chief Minister pursuant to article 6(3) of the Constitution. *A propos* of this Harley Acting C.J.'s finding was:—

> "It is accepted that this letter was signed by 21 persons who are members of Council Negri (There are 42 members in all of Council Negri plus the Speaker)."

On June 16, the Governor's private secretary wrote to the petitioner that the Governor being satisfied, on the representation of the majority in the Council Negri that the petitioner had ceased to command their confidence, he, the petitioner, was requested to present himself forthwith to tender his resignation. On June 17, the petitioner replied, regretting his inability to attend at the Astana the previous evening, pointing out that "the proceedings of the Council Negri held on 14th June, 1966, do not appear to support His Excellency's view that I have lost the confidence of the majority of its members", suggesting that "the proper course to resolve any doubts regarding my ability to command the confidence of the majority of Council Negri members is to arrange for the Council to be convened in order that the matter can be put to the constitutional test" and undertaking to abide by its outcome. He also asked for the names of Council members who had supported the representations.

On the same day, June 17, a letter from the Governor informed the petitioner that he and other members of the Supreme Council had ceased to hold office, and that Penghulu Tawi Sli had been appointed Chief Minister, with effect in both cases forthwith. The learned Acting Chief Justice's finding in this connection was that "it

* [1966] 2 M.L.J. 187.

was only in this letter and after the dismissal that the names were provided and the names that were provided are a list of 21 names and are the same names that appear on the letter of 14th June."

The petitioner's reply, also of the same date, expressed surprise at the action taken by the Governor because, to quote the petitioner:—

"It is not true that I have refused to tender my resignation — the question of tendering my resignation did not arise until after I received a reply to my letter requesting for the names of the members of the Council Negri.

It is clear from the list of names forwarded to me that the majority of the Council Negri members are not against me, as 21 cannot be the majority of 42."

On June 17 the *Sarawak Government Gazette Extraordinary* announced that the petitioner had ceased to be Chief Minister of Sarawak and that the four other persons therein named had ceased to be members of the Supreme Council. Another announcement proclaimed the appointment of Penghulu Tawi Sli as Chief Minister.

In the result the petitioner commenced action in the High Court at Kuching for a declaration that he was still Chief Minister and for an injunction restraining the new appointee from acting as Chief Minister. In his judgment Harley Acting C.J. held that "article 7(3) clearly means that the Governor may dismiss Ministers but may not dismiss the Chief Minister in any circumstances," and he went on as follows:—

"If the Constitution, however, should be construed as giving to the Governor a power to dismiss, that power can only be exercised — and I think that this was conceded by Mr. Le Quesne — when both

(a) the Chief Minister has lost the confidence of the House, and

(b) the Chief Minister has refused to resign and failed to advise a dissolution.

I have already dealt with (a); as regards (b), I do not think that the Chief Minister of Sarawak was ever given a reasonable opportunity to tender his resignation or to request a dissolution. He was never even shown the letter on which the dismissal was based until court proceedings started. Although it is true that at the moment of dismissal a list of signatories was sent to him with the letter from the Governor dated 17th June that list and that letter were typed on the same date as the publication in the *Gazette* of the dismissal of the plaintiff, who was given no time at all to consider the weight or effect of the move against him. Plaintiff did not refuse to resign: he merely expressed doubts whether in fact he had ceased to command a majority and requested 'that the matter be put to the constitutional test' . . . . In the instant case, the Chief Minister has not refused to resign, and there is no power to dismiss him. He has already indicated through his counsel that he was prepared to consider a dissolution and presently an election. That political solution may well be the only way to avoid a multiplicity of legal complications."

In the event this view of the learned Acting Chief Justice turned out truly prophetic. Judgment was given in favour of this petitioner on September 7, 1966. On September 14, His Majesty the Yang di-Pertuan Agong proclaimed a State of Emergency in Sarawak. On September 15 the Deputy Prime Minister made a statement at a press conference which was reported in Ministry of Information (Kuching) release headed *SITUATION IN SARAWAK*, bearing number PEN. 9/66/207 (INF). The gist of that statement was repeated subsequently in Parliament; so it need not detain me further by quoting therefrom.

In Parliament on Monday, September 19, 1966, the Deputy Prime Minister made a statement on the proclamation of the State of Emergency in Sarawak. [*In his statement the Deputy Prime Minister recapitulated at length the events that led to the constitutional impasse and the contents of the White Paper giving details on Communist subversive activities in Sarawak.*]

There is of course, another side to the picture so ably and forcefully presented by the Deputy Prime Minister. The principles of natural justice should apply not only in the courts but also in the proceedings of Parliament, of which judicial notice may be taken. At the second reading of the bill, Mr. D. R. Seenivasagam, the opposition member for Ipoh, replied to the points made by the Deputy Prime Minister. [*Mr. D. R. Seenivasagam expressed the view that the proclamation of emergency made in 1964, which was still in force, gave the Government all necessary powers to deal with any situation so as to render the second proclamation superfluous.*]

There was more in the same vein said by other members in opposition to the bill, but the points made generally were, first, that the petitioner was "well within his rights to choose to stay until 14th December 1966, when it will be mandatory on his part to convene the next meeting of the Council Negri"; secondly, that action be stayed because the petitioner had "fixed a meeting of all the five Divisional Advisory Councils on September 26, 1966. For if these five Divisional Advisory Councils, which are the electoral colleges which elect the Council Negri members, express confidence in the Cabinet of Dato' Stephen then it makes a hollow mockery of the Alliance claim that they command the majority vote in the Council"; and thirdly, a suggestion emanating from tthe petitioner "that an impartial Commission of Enquiry be appointed to go to Sarawak immediately to investigate if there is any emergency in the State:" (see speech of Dr. Tan Chee Khoon). The solutions proposed to settle the impasse included dissolution of the Council Negri, the Divisional Advisory Councils and District Councils and the acceleration of a general election; recourse, in the meantime, to a Caretaker Government and, alternatively, a referendum to test the popularity of the petitioner.

The bill was duly passed by a majority of 118 to nil, with no absention. On September 23,

1966, the Governor summoned a meeting of the Council Negri, pursuant to the amendments made in the State Constitution, and by a majority of 25 to nil, with 3 absentions, they passed a vote of no confidence in the petitioner. From the above recital of events that have passed into history it is perhaps not at all surprising that he felt aggrieved, not so much, perhaps, over his dismissal, as by the manner in which it was in the first place achieved. The result has been further proceedings in Kuching and now in this court.

Before I deal with the issue of fact, I would first of all state plainly what I conceive to be the duty and function of the judiciary. Even though inconveniences are liable to flow from a written Constitution, as happened in this case, it is outside the competence of the court to concern itself in any way with politics or the rights and wrongs in the manoeuvres of political factions. This is not an Elections Court. As Viscount Simon L.C. said in *King-Emperor* v. *Benoari Lal Sarma & Ors.*[2] at page 28,

> "Their Lordships feel bound to point out that the question whether the ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or policy."

The crucial question here is whether the proclamation was made (a) not to deal with a grave emergency whereby the security or economic life of Sarawak was threatened but (b) for the purpose of removing the petitioner from the office of Chief Minister of Sarawak. In my opinion there can be no two views that the primary objective was the removal of the petitioner. The Deputy Prime Minister himself said so in unambiguous terms. This finding of fact, nevertheless, does not *ipso facto* resolve the question entirely. My view, rightly or wrongly, is that this primary objective is not necessarily incompatible with a genuine concern — whether on adequate grounds or not is not for me to say — felt by the Cabinet as regards the security situation in Sarawak. I think it is true to say that the lessons of the twelve-year Emergency in Malaya had not been forgotten. Now, Sarawak naturally cannot be compared with more advanced countries that possess a more sophisticated electorate and electoral system, in which political squabbles pose no problems imperilling national security. It may very well be true that political instability in Sarawak could possibly have serious repercussions on the security of the State, although some may quite honestly consider it improbable or farfetched. Therefore, after the most anxious consideration of the matter, on both sides, I have come to the conclusion that I am unable to say, with any degree of confidence, that the Cabinet advice to His Majesty was not prompted by *bona fide* considerations of security. I am also equally unable to gauge the degree or extent which such concern for security bears on such advice in relation to the Cabinet's primary objective. At any rate, the Minister for Home Affairs, who should be the best informed, had this to say:—

> "I would be guilty, and I will be failing in my duty if, for example, I were to wait for three months, and during those three months the Communists got the upper hand through political means, because we know that one of the objectives of the Communists is to erode the fabric of the Government, to go into the political parties, and we have a great deal of evidence there on this Communist threat to Sarawak."

Consequently, I am of opinion that the petitioner has failed to make out a case to my satisfaction for holding that the Proclamation of Emergency was invalid as being *in fraudem legis*. This decision on the facts, let me state it plainly, does not mean that I agree with the contentions of learned counsel for the Federal Government. My view, in general, is that the acts of the Executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the courts. In partcular, when an emergency is proclaimed by Parliament, it is still open to challenge in court on the ground that it is *ultra vires* where cause can be shown.

In the petition there is also an alternative prayer, for an order declaring that sections 3, 4 and 5 of the measure known as The Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 are invalid, null and void and of no legal force and effect. I would apologise to Sir Dingle Foot for not discussing his arguments at length on this point. Putting it briefly, it seems to me — although, not being well-versed in constitutional law, I hold no strong views on this question — the overriding consideration of an emergency which justifies an amendment of the Federal Constitution itself must no less justify an amendment of the State Constitution, so far as may be strictly necessary. It may be deplored, as much as, for instance, preventive detention, but extraordinary times have justified extraordinary measures, with only good sense to serve as a restraint.

I would conclude, for the benefit of counsel for the Federal Government, by adding that I respectfully subscribe to the views expressed on Crown privilege by Lord Denning M.R. in the recent case of *Conway* v. *Rimmer*,[5] but even so, counsel's attempt herein to shut out the facts from the purview of this court seems to me hopelessly futile for the simple reason that, in the instant case, full reasons had been given for the Cabinet decision which are within the cognisance of this court. This is vastly different from the category of cases in which the grounds of decision of executive action had been withheld Furthermore, it is my view that the *ratio decidendi* in *Robinson* v. *State of South Australia (No. 2)*[6] is one binding on this court.

Finally, as to costs, since there are no merits whatsoever in the argument of counsel for the

Federal Government — indeed, his rather surprising contention was that the Cabinet action was purely a matter of Party discipline — I have given the question of costs special consideration and propose that the parties bear their own costs.

Application dismissed.

GOVERNMENT OF MALAYSIA v. GOVERNMENT OF THE STATE OF KELANTAN

[F.C. (Barakbah L.P., Azmi C.J. (Malaya), Ong Hock Thye F.J., Ismail Khan & MacIntyre JJ.) December 1, 1967]

[K.L. — Federal Court Special Reference No. X. 1 of 1967]

Constitutional Law — Financial provisions — Restriction on borrowing by State — Agreement between State Government and private corporation for grant of mining and forest concessions — Provisions for prepayment of royalties — Question whether such prepayment constituted a borrowing by State Government in violation of art. 112(2), Constitution of Malaysia — Question whether provisions for refunding prepayment would violate art. 97(2), Constitution of Malaysia and art. LVII of Kelantan State Constitution — Assignment of Revenue (Export Duty on Iron Ore) Act, 1962 and Assignment of Duty (Mineral Ores) Act, 1964 — Forest Rules under Kelantan State Enactment No. 4 of 1939, rr. 2 and 11 — Kelantan State Constitution, arts. LVII & LIX(1) — Constitution of Malaysia, arts. 97(2), 110(3), (3A) & (3B), 111(2) and 130 — Reference under art. 130 concerning arts. 111(2) and 97(2).

Article 111(2) of the Federal Constitution provides that a State shall not *borrow* except under the authority of State law, and State law shall not authorise a State to borrow except from the Federation or, for a period not exceeding 12 months, from a bank approved for that purpose by the Federal Government.

Article 97(2) provides that all monies and revenues howsoever raised or received by a State shall, subject to clause (3) and any law, be paid into the Consolidated Fund of that State.

Article LVII of the Kelantan State Constitution provides that no monies shall be *withdrawn* from the State Consolidated Fund unless they are (a) charged on such fund or (b) authorised by a State Supply Enactment.

By an agreement made on February 20, 1964 between the Kelantan State Government and the Timbermine Industrial Corporation Limited, it was provided by clauses 2 and 8 that the company should make prepayments of royalty for its mining and forest concessions which should be refunded by the State in the manner set out in detail therein.

The view of the Federal Government which was disputed by the State Government was that (a) the prepayment of royalties constituted a borrowing in violation of article 111(2) of the Federal Constitution and (b) that the refunding thereof would violate article 97(2) of the Federal Constitution and article LVII of the Kelantan State Constitution. Upon the questions in dispute being referred by His Majesty the Yang di-Pertuan Agong to the Federal Court for its opinion:—

Held: (1) upon considering the agreement as a whole, rather than the impugned clauses in isolation, there was no legal relationship of lender and borrower as between the company and the State Government, since "borrowing necessarily implies repayment at some time under some circumstances" and there was no liability to repay upon forfeiture for breach of conditions imposed on the company.

Dicta of Lord Davey in *N. E. Railway* v. *Hastings*,(2) of Somervell L.J. in *Inland Revenue Commissioners* v. *Rowntree & Co. Ltd.*,(3) and of Buckley J. in *In re Southern Brazilian Rio Grande do Sul Railway Company Ltd.*(1) applied.

Per Ong Hock Thye F.J.: "Since repayment of the monies advanced is not an essential feature of the transaction the conclusion becomes inevitable that the hallmark of a true borrowing is lacking. . . Indeed, such prepayments have been a common feature of mining agreements in Malaya, together with the forfeiture clause."

Per MacIntyre J.: "As far as I can ascertain, there is nothing in the State Enactment to prevent the executive authority of the State to prescribe, as a condition in a special licence, that a specified sum should be prepaid to account of royalty. Nor could such a condition be regarded as unbusinesslike or repugnant to public policy."

(2) the prepayment of $1,000,000 having been credited to the State Consolidated Fund, there was no breach of article 97(2) of the Federal Constitution, and there was no ground for supposing that further payments, if any, would not go similarly into that Fund.

Per MacIntyre J.: "The retention of the 50% by the company is not a refund out of the sum pre-paid and therefore the authority of a Supply Enactment is not required to retain money never paid into the Consolidated Fund."

Cases referred to:—

(1) *In re Southern Brazilian Rio Grande do Sul Railway Co. Ltd.* [1905] 2 Ch. 78, 83.

(2) *N. E. Railway* v. *Hastings* [1900] A.C. 260, 267.

(3) *Inland Revenue Commissioners* v. *Rowntree & Co. Ltd.* [1948] 1 All E.R. 482, 487.

FEDERAL COURT REFERENCE.

Mohamed Salleh bin Abas (Solicitor-General) and *Ibrahim bin Salleh* (Sr. Federal Counsel) for the applicant.

Thomas O. Kellock, Q.C., (*Dato' Wan Mustapha* and *Wong Kim Fatt* with him) for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgments of Azmi C.J. (Malaya), Ong Hock Thye F.J. and MacIntyre J. and I agree with them; but on account of the importance of the case I wish to say a few words. There is no doubt, despite the able arguments addressed to us by the learned Solicitor-General, that, reading the agreement as a whole the prepayment mentioned in clauses 2 and 8 of the agreement cannot be regarded as a loan.

The question under reference is whether article 111(2) and article 97(2) of the Federal Constitution are violated by clauses 2(a) and (b) and clauses 8(a) and (b) of the agreement dated 20th July, 1964. It was not disputed that to constitute a loan there must be an obligation to repay; there must be a money transaction and there must be a borrower and a lender.